KREDIN SDN. BHD.

v.

DEVELOPMENT & COMMERCIAL BANK BERHAD

COURT OF APPEAL, KUALA LUMPUR
DATUK SITI NORMA YAAKOB JCA
DATUK SHAIK DAUD BIN HJ. MOHD. ISMAIL JCA
DATO' ABU MANSOR BIN ALI JCA
[CIVIL APPEAL NO. W-02-304-94]
10 JULY 1995

COMPANY LAW: *Winding up - Attachment of company's assets after commencement of winding up petition - Whether void - Whether barred by s. 224 of Companies Act - Possibility that petition might ultimately be withdrawn - Whether irrelevant - Ratio in Pembinaan KSY Sdn. Bhd. v. Lian Seng Properties Sdn. Bhd. & Anor. - Whether still good law - Companies Act 1965 ss. 219(2), 224.*

INTERPRETATION: *Companies Act 1965 - Construction - Section 219(2) read with s. 224 of Act - Effect.*

On 14 August 1987, Bank Bumiputra Malaysia Berhad (BBMB) filed a petition to wind up the appellant (Kredin). In 1990, upon the withdrawal of BBMB, Overseas Chinese Banking Corporation was substituted the petitioner. This petition was pending.

In 1988, after the commencement of the petition by BBMB, the respondent bank sued Kredin on a certain loan agreement and obtained judgment for RM 33,935,372.36. To execute the judgment, the bank registered a prohibitory order on five parcels of land belonging to Kredin and subsequent to that, applied for a writ of seizure and sale. Kredin responded by applying to set aside the execution proceedings and also the prohibitory order. Before the learned Judge Kredin argued, on the authority of *Pembinaan KSY Sdn. Bhd. v Lian Seng Sdn. Bhd. & Anor.* [1991] 3 CLJ 1836, that the prohibitory order, having been registered after a winding up petition had commenced, contravened s. 224 of the Act and was hence void.

The learned Judge took a contrary view and consequently dismissed Kredin's applications. According to the Judge the said prohibitive order could only be rendered void after a winding up order had actually been made but not otherwise. This apart, the Judge also considered the possibility that the petition might ultimately be withdrawn or dismissed, and on that score ruled that putting into force an execution after presentation of a petition did not render such execution null and void under s. 224 . Kredin hence appealed. Before the appeal Judges what came to be determined were:

1. The proper interpretation to be given to s. 219(2) of the Companies Act 1965, in particular its practical effect when read with s. 224 of the Act.

2. Whether the case of *Pembinaan KSY Sdn. Bhd.* was rightly decided and is still good law.

Held:

Per Siti Norma Yaakob JCA (delivering the judgment of the Court):

[1] Section 219 was enacted specially to protect the creditors, particularly the unsecured creditors who must be treated equally when it comes to their claims against the company in debt. That equality is maintained even during the interim period between the date of the presentation of the petition for winding up to the date when the order for winding up is

made. During that period the law sees to it that the assets or effects of the company will not be dissipated to enrich one or more unsecured creditor at the expense of other unsecured creditors.

[2] Section 224 preserves the assets and effects of the company. It is to safeguard this underlying principle that there is this notion of a relation back that once a winding up order is made, it relates back to the date of the presentation of the winding up, the date when the winding up is deemed to have commenced.

[3] It follows that all attachments, sequestration, distress or execution put in force against the estate or effects of a company made within the interval of the presentation to wind up and the date when the order to wind up is made by the Court, are void. The fact that no winding up order will ultimately be made makes no difference, as s. 219 is not concerned whether a winding up order will ultimately be ordered or not, but that, in mandatory tones it provides protection to unsecured creditors once a winding up is deemed to have commenced, that is upon the presentation of the petition.

[4] To say that the protection is only present as and when the winding up order is eventually made is to go against the intention of Parliament. Clearly that protection arises once a winding up commences and the date of commencement is nothing more than a question of fact ascertained from the date of the presentation of the winding up. In the circumstances the decision in *Pembinaan*'s case has been rightly decided as opposed to the one in this appeal.

[Appeal allowed]

[**Bahasa Malaysia** Translation of Headnotes]

UNDANG-UNDANG SYARIKAT: *Penggulungan - Penahanan aset-aset syarikat selepas permulaan petisyen penggulungan - Samada tak sah - Samada terhalang oleh s. 224 Akta Syarikat - Kemungkinan bahawa petisyen secara muktamad ditarik-balik - Samada tak relevan - Ratio dalam kes Pembinaan KSY Sdn. Bhd. lwn. Lian Seng Properties Sdn. Bhd. & Satu Lagi - Samada masih kekal sebagai undang-undang sah - Akta Syarikat 1965, ss. 219(2), 224.*

TAFSIRAN: *Akta Syarikat 1965 - Pentafsiran - Seksyen 219(2) dibaca bersama s. 224 Akta tersebut - Kesan.*

Pada 14 Ogos 1987, Bank Bumiputra Malaysia Berhad (BBMB) telah memfailkan satu petisyen untuk menggulung perayu (Kredin). Dalam tahun 1990, setelah penarikan BBMB, Overseas Chinese Banking Corporation telah digantikan sebagai pempetisyen. Petisyen ini masih menunggu penyelesaian.

Dalam tahun 1988, selepas permulaan petisyen oleh BBMB, bank responden telah mendakwa Kredin atas satu perjanjian pinjaman dan berjaya memperolehi penghakiman sebanyak RM33,935,372.36. Bagi menyempurnakan penghakiman, pihak bank telah mendaftarkan perintah larangan ke atas 5 bidang tanah kepunyaan Kredin dan berikutan itu, telah memohon untuk mendapatkan writ penahanan dan jualan. Kredin membalas dengan memohon untuk mengenepikan prosiding pelaksanaan dan juga perintah larangan tersebut. Di hadapan Hakim yang bijaksana Kredin berhujah, atas autoriti *Pembinaan KSY Sdn. Bhd. lwn. Lian Seng Sdn. Bhd. & Satu lagi* [1991] 3 CLJ 1836, bahawa perintah larangan tersebut, oleh kerana telah didaftarkan selepas petisyen penggulungan dimulakan, telah melanggari s. 224 Akta Syarikat dan dengan itu adalah tak sah.

Tuan Hakim yang bijaksana telah mengambil pandangan yang bertentangan dan berikutan itu telah menolak permohonan Kredin. Menurut Hakim perintah larangan itu hanya menjadi tak sah selepas satu perintah penggulungan telah sebenarnya diberikan, tetapi tidak jika sebaliknya. Selain itu, Hakim juga menimbangkan kemungkinan bahawa petisyen tersebut mungkin secara mutlaknya akan ditarik-balik atau ditolak, dan atas sebab itu memutuskan bahawa, menguatkuasakan sesuatu pelaksanaan selepas pengemukaan petisyen tidak menjadikan pelaksanaan yang sedemikian batal dan tak sah di bawah s. 224. Kredin dengan itu merayu. Di hadapan Hakim-hakim rayuan apa yang perlu diputuskan adalah:

1. Tafsiran wajar yang harus diberikan kepada s. 219(2) Akta Syarikat 1965, khususnya kesan praktikalnya apabila dibaca bersama s. 224 Akta tersebut.

2. Samada kes *Pembinaan KSY Sdn. Bhd.* telah diputuskan dengan betulnya dan masih merupakan undang-undang yang dipakai.

Diputuskan:

Oleh Siti Norma Yaakob HMR (menyampaikan penghakiman Mahkamah):

[1] Seksyen 219 telah diperbuat khas bagi melindungi pemiutang-pemiutang khusus pemiutang tanpa cagaran yang semestinya diberikan layanan yang sama berhubung dengan tuntutan mereka terhadap syarikat yang berhutang. Kesamaan itu dikekalkan walaupun dalam tempoh interim antara tarikh pengemukaan petisyen untuk penggulungan sehingga kepada tarikh perintah untuk penggulungan dibuat. Dalam tempoh itu undang-undang memastikan bahawa aset-aset atau harta-benda syarikat tidak dihamburkan bagi memperkayakan satu atau lebih pemiutang-pemiutang tanpa cagaran sambil merugikan pemiutang-pemiutang tanpa cagaran yang lain.

[2] Seksyen 224 memelihara aset-aset dan harta benda sesebuah syarikat. Ianya adalah untuk melindungi prinsip tersembunyi bahawa terdapatnya tanggapan perkaitan ke belakang, bahawa sebaik sahaja satu perintah penggulungan dibuat, ianya menghubungkaitkan tarikh pengemukaan penggulungan tersebut, tarikh bilamana penggulungan tersebut dianggap sebagai telah bermula.

[3] Ianya mengikut bahawa kesemua penahanan, sekuestrasi, distres atau pelaksanaan yang dikuatkuasakan terhadap harta-benda atau barangan sesebuah syarikat, yang dibuat dalam tempoh jarak pengemukaan untuk menggulung dan tarikh bilamana perintah untuk penggulungan dibuat oleh Mahkamah, adalah tak sah. Hakikat bahawa tiada perintah penggulungan akan dibuat secara muktamadnya tidak memberikan apa-apa perbezaan, kerana s. 219 tidak menghiraukan sama ada satu perintah penggulungan akan akhirnya diperintahkan atau pun tidak, tetapi, secara mandatorinya, memberi perlindungan kepada pemiutang-pemiutang tanpa jaminan sebaik sahaja pengemukaan petisyen.

[4] Untuk menyatakan bahawa perlindungan hanya wujud bilamana dan ketika perintah penggulungan akhirnya dibuat adalah menentang tujuan Parlimen. Adalah jelas bahawa perlindungan berbangkit sebaik sahaja sesuatu penggulungan bermula dan tarikh penggulungan hanya merupakan persoalan fakta sahaja yang ditentukan daripada tarikh pengemukaan penggulungan tersebut dan tidak lebih daripada itu. Dalam keadaan yang sedemikian, keputusan dalam kes *Pembinaan* telah diputuskan dengan betul bertentangan dengan keputusan yang dibuat dalam kes rayuan ini.

[Rayuan dibenarkan]

Cases referred to:
Pembinaan KSY Sdn. Bhd v. Lian Seng Properties Sdn. Bhd. & Anor. [1991] 3 CLJ 1836 ***(aff)***
Motor Terms Company Pty. Limited v. Liberty Insurance Limited [1967] 116 CLR 177 ***(refd)***

For the appellant - K.S. Narayanan (Dennis Xavier with him); M/s. Jayaraman, Ong & Co
For the respondent - N.V. Nadkarni; M/s. Lee Hishamuddin

JUDGMENT

Siti Norma Yaakob JCA:

The only matter in issue in this appeal is the interpretation to be given to s. 219(2) of the Companies Act, 1965 and its practical effect when read together with s. 224 of the same Act. This issue is further compounded by the fact that there are now in existence two conflicting decisions of the High Court based on facts that are somewhat similar.

Section 219 fixes the commencement of a winding up by the Court in voluntary and compulsory winding up petitions and in the case of the latter, subsection (2) deems such commencement to be at the time the winding up petition is presented. For ease of reference, I reproduce s. 219(2) as follows:

> (2) In any other case the winding up shall be deemed to have commenced at the time of the presentation of the petition for the winding up.

Section 224, on the other hand, is concerned with the avoidance of certain attachments, etc. after the commencement of a winding up and in substance it reads as follow:

> 224 Any attachment, sequestration distress or execution put in force against the estate or effects of the company after the commencement of the winding up by the Court shall be void.

The undisputed facts leading to this appeal are as follows. On 14 August 1987, Bank Bumiputra Malaysia Berhad (BBMB) who is not a party in these proceedings, filed a petition to wind up the appellant (Kredin) in Kuala Lumpur High Court winding up petition no. 02-42-375-87. Two and a half years later, on 19 February 1990, upon the withdrawal of BBMB, Overseas Chinese Banking Corporation was substituted the petitioner but up to date, the petition against Kredin is still pending.

On 23 January, 1988 after the commencement of the winding up petition by BBMB, the respondent Bank sued Kredin on a loan agreement dated 29 October 1982, in Kuala Lumpur High Court Civil Suit No. D2-23-215-88 (the civil suit). Kredin filed its statement of defence on 29 April 1988, but it was set aside on 14 April 1989, following an application by the respondent Bank under the provision of O. 18, r. 19 of the Rules of the High Court 1980, and judgment for RM33,935.36 together with interest and costs, was entered against Kredin.

It was to execute this judgment that the respondent Bank registered a prohibitory order on 5 parcels of land belonging to Kredin on 31 March 1992, and in Kuala Lumpur High Court application for execution no. 36-9-92 (the execution file), the respondent bank applied for a writ of seizure and sale against Kredin. It was following these execution proceedings that Kredin

(1) filed an application dated 3 June 1992, in the civil suit to have the judgment dated 14 April 1989 set aside.

(2) filed an application to stay all proceedings in the execution file.

(3) filed an application to set aside the prohibitory order in the execution file.

All three applications were heard by V.C George J (as he then was) who dismissed all the applications with costs but it is in respect of one particular application that we are now concerned with, namely the application by Kredin to have the prohibitory order set aside on the ground that it is void under s. 224 of the Act, as it was filed after the commencement of the petition for winding up under s. 219(2) of the Act. V.C George J (as he then was) found otherwise and whilst acknowledging that s. 219(2) creates a statutory fiction, giving rise to a contingent future possible winding up, the fact that no winding up order has been made does not render the prohibitory order void. It can only be rendered void after a winding up order had been made. The learned Judge also considered the possibility that the petition might ultimately be withdrawn or dismissed and it is this posibility that further strengthens his reasoning that putting into force an execution after presentation of a petition does not render such execution null and void under s. 224.

This decision runs contrary to another earlier decision reached by Lim Beng Choon J in the case of *Pembinaan KSY Sdn. Bhd. v. Lian Seng Properties Sdn. Bhd. & Anor.* [1991] 3 CLJ 1836. Pembinaan had obtained two money judgments against Lian Seng on 31 March 1987, and 17 November 1988. To execute these judgments, Pembinaan obtained two prohibitory orders on 26 October 1989, against lands belonging to Lian Seng, as well as two writs of seizure and sale over the same lands. At the same time, Pembinaan had also presented a petition for winding up against Lian Seng.

In proceedings to set aside an interlocutory injunction obtained *ex-parte*, one of the objections taken by Lian Seng was that the prohibitory orders on which *Pembinaan's* sole cause of action arose, were void as they infringed s. 224 read with s. 219(2) of the Act.

After considering the purpose of s. 224, the deeming provisions of s. 219(2) and the principles of construction of a statute, Lim Beng Choon J concluded that Pembinaan had no right to obtain the two prohibitory orders as it had already presented a winding up petition against Lian Seng. On that finding, the learned Judge held the two prohibitory orders to be null and void under s. 224. This decision was appealed against and although the then Supreme Court dismissed the appeal, we do not have the benefit of a written judgment to ascertain the reasons for the dismissal of the appeal or whether the issue on the interpretation of s. 219(2) read together with s. 224 were canvassed at all. Hence the burden lies upon us to determine which of the two conflicting decisions represent the true intention and purpose of Parliament when it enacted s. 219(2) and s. 224 of the Act.

That purpose and intent were considered by the High Court of Australia in the case of *Motor Terms Company Pty. Limited v. Liberty Insurance Limited* [1967] 116 CLR 177, when the Court was interpreting the provisions of s. 223(2) of the Australian Companies Act, 1961 (NSW), which is equivalent to our s. 219(2). Barwick CJ had this to say.

> The date of the presentation of the petition on which the order is made is set by the Companies Act (s. 223(2)) as the date of the commencement of the liquidation, that is to say, as the date of the commencement of the process of administering the assets of the company with a view to their proper distribution according to the statute amongs the creditors. That date to my mind is both the logical and the practical date, as well as being the date chosen by the legislature, as at which to determine who are the creditors and as at which to adjust their rights.

Thus s. 219 was enacted specially as a means to protect the creditors, particularly the unsecured creditors who must be treated equally when it comes to their executing their claims against the company in debt. That equality is maintained even during the interim period between the date of the presentation of the petition for winding up to the date when the

order for winding up is made. During that period, the law sees to it that the assets or effects of the company will not be dissipated to enrich one or more unsecured creditors. Section 224 preserves the assets and effects of the company and it is to safeguard this underlying principle that there is this notion of a relation back that once a winding up order is made, it relates back to the date of the presentation of the winding up, the date when the winding up is deemed to have commenced. It follows that all attachments, sequestration, distress or execution put in force against the estate or effects of a company made within the interval of the presentation to wind up and the date when the order to wind up is made by the Court, are void. The fact that no winding up order will ultimately be made makes no difference to this finding, as s. 219 is not concerned whether a winding up order will ultimately be ordered or not but that in mandatory tones it provides protection to unsecured creditors once a winding up is deemed to have commenced, that is upon the presentation of the petition. Thus to say that protection is only present as and when the winding up order is eventually made is to go against the very intention of what Parliament had enacted. That protection arises once a winding up commences and the date of the commencement is nothing more than a question of fact ascertained from the date of the presentation of the winding up. For that reason, we consider that the decision reached in *Pembinaan's* case has been rightly made as opposed to the one in this appeal before us. We, therefore, allow this appeal with costs here and below and that the deposit be refunded to the appellant.